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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO MORALES, Defendant and Appellant.	B236088 (Los Angeles County Super. Ct. No. BA 384345)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose Sandoval, Judge. Affirmed in part; reversed in part and remanded.

Kari E. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Sarah J. Farhat and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Ricardo Morales appeals from the judgment entered following a court trial that resulted in his conviction for possession of marijuana while driving, an infraction, as charged in count 5 of the information, and a jury trial that resulted in his convictions for felony driving under the influence of PCP[1] (count 1), felony possession of PCP (count 2), and misdemeanor being under the influence of PCP (count 3), and court findings that he had suffered two prior convictions for driving under the influence of alcohol and/or drugs as alleged in count 1.[2]

Appellant was sentenced to prison for the total term of three years eight months, consisting of the three-year upper term on count 1 and eight months, or one-third the two-year middle term, on count 2. On count 3, the court sentenced him to 180 days in county jail but stayed service of the sentence pursuant to Penal Code section 654.[3] On count 5, the court imposed a two-day county jail sentence.

Appellant contends the trial court erred in failing to stay his sentence on count 2, because his driving under the influence of PCP (count 1) is indivisible from his possession of PCP (count 2), and thus, section 654 applies to bar separate punishments on counts 1 and 2. He further contends the trial court erred in imposing a sentence of imprisonment for the infraction offense in count 5.

Respondent concedes the trial court erred in imposing a two-day county jail sentence on count 5 but contends the case must be remanded for the trial court to impose a monetary fine within the scope of its discretion. Respondent contends the sentence on count 3 was improperly stayed under section 654 and that remand for resentencing as to this count also is required.

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1 PCP is an acronym for phencyclidine, a controlled substance (Health & Saf. Code, § 11055, subd. (e)(3)).

2 The information did not contain a count 4. That charge was dismissed for insufficient evidence at the preliminary hearing.

3 All further section references are to the Penal Code unless otherwise indicated.

We note the record does not appear to indicate any disposition of the two prior prison term allegations, each of which, if found true, requires the imposition of a one-year enhancement (§ 667.5, subd. (b)), unless stricken (§ 1385, subd. (a)).

We conclude section 654 does not bar punishment for the offense in count 2, because appellant's possession of PCP (count 2) is a distinct and separate physical act from his driving while under the influence of PCP (count 1). In contrast, the trial court did not err in staying the sentence for the offense in count 3, because appellant's convictions for driving while under the influence of PCP (count 1) and for being under the influence of PCP (count 3) arose from the same contemporaneous criminal conduct of appellant being under the influence of PCP at the time these offenses were committed.

We find well-taken respondent's concession that the trial court erred in imposing imprisonment as punishment for the infraction offense in count 5. The sentence on count 5 therefore must be vacated and the matter remanded to the trial court for resentencing. Remand for further proceedings regarding the disposition of the two prior prison term allegations is also necessary. In all other respects, we affirm the judgment.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On January 21, 2011, about 4:00 p.m., appellant drove his car about 15 to 20 miles per hour up an on-ramp to the northbound Interstate Route 5 freeway in Los Angeles County. His car then drifted right to left across four lanes of traffic, struck the center divider, and bounced back into the two lanes to the right before drifting back. The car hit the center divider at an angle and came to a stop on the left shoulder of the road. Brian McWilliams, an eyewitness, approached appellant, who had exited the car

and stood at the center divider. Appellant appeared confused, made erratic motions, and "looked like he was not in his right mind." McWilliams assisted appellant to sit on the ground. When asked if he were okay, appellant did not respond. He did not appear to know where he was nor to be aware that McWilliams was speaking to him. Appellant had a "wild look in his eye" and seemed impaired.

Upon responding to the scene, California Highway Patrol Officer Mahmood Khan smelled a strong PCP odor emanating from appellant. He physically had to help appellant rise from the ground due to his inability to keep his balance. When Khan spoke to him, appellant stared blankly and said, "huh." His eyes were "glassy." Khan believed appellant was under the influence of drugs or alcohol. He attempted to administer a field sobriety test but ceased after appellant proved to be unresponsive.

During a search, Khan recovered from appellant's sock a small glass vial containing a small amount of liquid that smelled like PCP and a plastic bag with a green leafy substance that smelled like marijuana. The bag contained 5.47 grams of plant material containing marijuana, and the vial contained 0.8 milliliters of liquid containing PCP.

Kahn showed the recovered PCP and marijuana to Officer Oscar Chavez, a drug recognition expert. When Chavez asked appellant what he had in his possession, he admitted that the PCP and marijuana belonged to him and he had bought both the same day of the accident. He related that he bought "approximately $40 of marijuana a week in order to help him sleep," and he used PCP "recreationally" when attending parties. Appellant ingested PCP by dipping a marijuana cigarette in liquid PCP and then smoking it. "Zig-Zags" are small white pieces of paper about two to three inches square, sold in a package, and used to wrap tobacco. They are also used to wrap marijuana to make a marijuana cigarette or "joint." Chavez was unaware of anyone finding that type of paper in this case.

Officer Chavez opined that if the PCP-dipped marijuana cigarette were smoked, it would take a minute to up to five minutes for the user to feel the effects of the PCP,

which would peak about 15 minutes to a half hour afterward but the effects could last in the user's system up to six hours or even several days.

Appellant denied smoking PCP the day of the accident but admitted he had purchased the recovered PCP that day for $20 and intended to use it at a party that night. Officer Chavez opined appellant's vial of PCP contained enough liquid for dipping a marijuana cigarette. He also opined appellant was under the combined influence of PCP and marijuana.

Martin Chenevert, the emergency physician who examined appellant the day before testifying, testified that without more information, he could not form an opinion whether appellant presented "a medical issue or a toxicological -- or drug issue or an ingestion issue."

DISCUSSION

1. Section 654 Inapplicable to Count 2 Sentence

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Section 654 prohibits multiple punishment for *a single physical act* that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358 (*Jones*), italics added.) "[T]he law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment." (*Id*. at p. 353.)

In this instance, the offense of possession of PCP (count 2) and that of driving while under the influence of PCP (count 1) did not arise from "a single physical act." The undisputed evidence reflects appellant did not possess the PCP found in his sock for the purpose of driving under the influence of PCP. Appellant had bought the recovered PCP on the date of his accident but before the accident and for the purpose of ingesting this PCP at a party later that night. His denial of ingesting PCP on the date of his arrest leads to the inescapable inference that he had ingested the PCP under which influence he was driving at some earlier time, at least the day before.

Accordingly, the physical act of *possession* of PCP is distinct and different from the physical act of *driving* while under the influence of PCP. Section 654 therefore is factually inapplicable. (Cf. *People v. Holly* (1976) 62 Cal.App.3d 797, 800, 805-806 [§ 654 bars multiple punishment for possession of heroin in a quantity which defendant could use in a "relatively short time" and being under the influence of heroin]; but see *People v. Maese* (1980) 105 Cal.App.3d 710, 726-728 [no § 654 bar for being under the influence of heroin and possession of heroin where quantity of heroin "could not be used in as short a time period as was possible in *Holly*"].)

2. Remand for Resentencing on Count 3 Not Warranted

Respondent contends the trial court improperly stayed the punishment for count 3 pursuant to section 654, because there was no evidence that appellant entertained only a single objective in being under the influence of PCP (count 3) and driving while under the influence of PCP (count 1). Appellant does not challenge respondent's position.

Initially, we note this issue is properly before us although respondent has not filed an appeal. "'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.'" (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Nonetheless, "on direct appeal the reviewing court is confined to the record. We cannot remand a case to the trial court for the purpose of trying an issue raised for the first time on appeal." (*People v. Sparks* (1967) 257 Cal.App.2d 306, 311.)

Appellant's driving while under the influence of PCP (count 1) and his being under the influence of PCP (count 3) do not amount to "a single physical act." Rather, these offenses charged in counts 1 and 3 constitute a course of criminal conduct.

In *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), our Supreme Court stated "[f]ew if any crimes . . . are the result of a single physical act" and announced this test: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the

defendant may be punished for any one of such offenses but not for more than one." (*Id*. at p. 19; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1205-1206 [criticizing but not overruling the *Neal* test]; but see *People v. Correa* (2012) 54 Cal.4th 331, 334 [§ 654 not bar multiple punishment for multiple violations of same criminal statute, disapproving contrary dictum in *Neal, supra*, at p. 18, fn. 1].)

Applying the *Neal* test, we conclude the trial court did not err in staying the 180-day jail sentence for appellant's conviction for *being under the influence of PCP* (count 3), because his intent and objective in that regard is inseparable, and thus indivisible, from his intent and objective in driving *while under the influence of PCP* (count 1).

We are not persuaded by respondent's argument to the contrary that "the objective required for driving under the influence of drugs is simply to move a vehicle volitionally (provided that the circumstantial element of intoxication is satisfied)" and that "[b]eing 'under the influence' of a drug simply refers to the circumstance of having one's ability to operate a motor vehicle sufficiently impaired by drugs." This is a distinction without a difference.

The common denominator of both counts 1 and 3 is appellant was "under the influence of" PCP. Although one may commit the crime of being under the influence of PCP without driving, one cannot commit the crime of driving while under the influence of PCP unless the driver is under the influence of PCP. The circumstances here are unlike the situation in which the defendant already was under the influence of PCP before he or she began driving under the influence of PCP. Here, both charges of being under the influence of PCP (count 3) and driving under the influence of PCP (count 1) arose from the same contemporaneous criminal conduct of appellant being under the influence of PCP at the time these crimes were committed. (Cf. *People v. McGuire* (1993) 14 Cal.App.4th 687, 690-691, 699 [divisible course of conduct in that crime of being under the influence of methamphetamine completed three hours before commission of driving while under its influence, "an additional separate and distinct offense for which further punishment . . . proper"].)

3. Remand for Resentencing on Count 5 Required

Appellant contends, and respondent concedes, the trial court erred in imposing a two-day jail term for the infraction offense in count 5. We agree.

In count 5, appellant was charged with possessing marijuana while driving in violation of Vehicle Code section 23222, subdivision (b), which provides in pertinent part: "Except as authorized by law, every person who possesses, while driving a motor vehicle[,] . . . not more than one avoirdupois ounce of marijuana . . . is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100)." "An infraction is not punishable by imprisonment." (Pen. Code, § 19.6.)

The record reflects in finding appellant guilty of the count 5 infraction, the trial court acknowledged "the most [it] can assess in the way of penalty is a hundred dollars." The court, however, imposed a two-day sentence on that count. This was an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An unauthorized sentence "is subject to judicial correction whenever the error comes to the attention of the reviewing court. [Citations.]" (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) We therefore reverse the sentence on count 5 and remand the case for the trial court, in the exercise of its discretion, to impose a fine in an amount no more than $100.

4. Remand for Disposition of Two Prior Prison Term Allegations Required

The record reflects appellant admitted having suffered the two prior convictions alleged in count 1, which the trial court found true, but it does not appear to indicate any disposition of the two prior prison term allegations, each of which, if found true, requires a one-year enhancement (§ 667.5, subd. (b)), unless stricken (§ 1385, subd. (a)).

On remand, the trial court is directed orally to set forth the disposition of the two prior prison term allegations, i.e., whether one or both are true or not and to impose one year for each prior prison term found true unless, in the exercise of its discretion, the trial court strikes one or both and sets forth the reasons therefore in the minutes. (See, e.g., *People v. Bradley* (1998) 64 Cal.App.4th 386, 390-392, & fn. 2,

400, & fn. 5; *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-193; see generally § 1385, subd. (a).)

DISPOSITION

Appellant's sentence on count 5 is reversed, and the case is remanded to the trial court for further proceedings in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.